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Case No. 01-933

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

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RAYMOND CHAPIN, *Petitioner*,

v.

MICHAEL W. MOORE, Secretary,
Florida Department Of Corrections, *Respondent*.

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PETITION FOR A WRIT OF CERTIORARI FROM
THE ELEVENTH CIRCUIT COURT OF APPEALS

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# BRIEF OF RESPONDENT IN OPPOSITION

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COUNSELS FOR RESPONDENT

11PP

## QUESTION PRESENTED

Petitioner, Chapin, presents one question to this Court. This question was not presented to the Eleventh Circuit Court of Appeal:

1. Whether equitable tolling doctrine applies to a dismissal, as untimely filed, of a 28 USC § 2254 petition because the untimely filing was due to the misapprehension of counsel in a case that became final before the passage of Section 28 U.S.C. § 2244(d)(1)(a) and (d)(2) and in which the federal habeas petition was filed in 1999. (Restated)

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Case No. 01-933

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**SUPREME COURT OF THE UNITED STATES**

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CECIL WILLIAM Chapin, *Petitioner*,

v.

MICHAEL W. MOORE, Secretary,
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## OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is an unpublished order denying a certificate of appealability issued by the Eleventh Circuit Court of Appeals on September 18, 2001.(App E).[1] The order denied review of the District Court's unreported order denying habeas relief.(App B)

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[1] The symbol"App" followed by the appropriate letter represents a citation to the materials contained in the Petitioner's Appendix to his petition.

## JURISDICTION

Chapin seeks review pursuant to 28 U.S.C. §1254(1) of a unpublished decision of the Eleventh Circuit filed on September 18, 2001which denied a certificate of appealability. This Court has jurisdiction.

In order to obtain review under 28 U.S.C. §1254(1), petitioner must show that the Eleventh Circuit was presented and passed on the questions raised in his petition. Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998), City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987) This Chapin cannot do.

In his statement of the case, Chapin acknowledges that the petition for writ of habeas corpus was denied on the basis that it was untimely. In his request for a certificate of appealability he argued that equitable tolling exists, that attorney error was sufficient to establish equitable tolling and alternatively that there is an actual innocence exception to the statute of limitations. The Eleventh Circuit denied a certificate of appealability. The Eleventh Circuit did not rule on the claims presented by this petition. It only ruled that no certificate should issue. Thus, the merits of the question presented, herein, which was not passed upon by the Eleventh Circuit should not be entertained by this Court.

Respondent maintains that petitioner has failed to establish a basis under 28 U.S.C. §1254 for certiorari review.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts petitioner's list of constitutional and statutory provisions.

## STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's rendition of the history of the case.

## REASONS FOR DENYING THE WRIT

### THE DECISION OF THE COURT BELOW IS THE CORRECT STATEMENT OF THE LAW AND THUS ISSUANCE OF THE WRIT SHOULD BE DENIED.

In this petition for a writ of certiorari, Chapin contends that this Court should grant review of the unpublished decision of the Eleventh Circuit denying a certificate of appealability as the decision resolved an important question of federal constitutional law. The Respondent disagrees and urges this Court to deny review.

Petitioner's question presents three arguments relative to the merits of the timeliness issue. Petitioner's problem is that the merits of the arguments were not passed on by the Eleventh Circuit. The Court addressed only whether a certificate of appealability should issue. The issue passed upon by the Eleventh Circuit was whether petitioner met the standard of. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000)(App. E) where this Court held:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard provided in Barefoot, supra, at 893, and n. 4, 103 S.Ct. 3383, and adopted by Congress in AEDPA. Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable

> jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Id. at 120 S.Ct. 1604

Thus, the state maintains that Chapin's question and the arguments presented in support of this petition which go to the merits of his claims and do not consider the Slack criteria were not presented to or passed on by the Eleventh Circuit, Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998), City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987), and review should be denied.

To the extent that any issue could be considered passed upon by the decision of the Eleventh Circuit, the only available issue is whether the Circuit Court correctly applied Slack. This is not an important federal constitutional issue but merely one of the application of a settled standard. Thus, this Court should not grant review.

In any event, an evaluation of the Circuit Court's application of Slack does not suggest certiorari should be granted. In Artuz v. Bennett 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000), and in Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), this Court indicated that the one year time period is a period of limitations, implying that equitable remedies are available. Moreover, every Circuit which has addressed the claim has held that because the period is a statute of limitations, equitable tolling is permissible. Thus, Chapin's first argument provides no basis for granting review as no controversy exists. All reasonable jurists including the Eleventh Circuit hold that equitable tolling is available when extraordinary circumstances exist.

Petitioner's additional arguments do not provide a basis

for the grant of certiorari. Petitioner acknowledges that every Circuit which has addressed his second argument has held that attorney error in calculating the one year time period does not qualify as extraordinary circumstances justifying equitable tolling. Thus, the Circuit Court's determination of the Slack factors is in conformance with the other Circuits. Therefore, no basis has been shown for this Court to grant Certiorari. As to actual innocence being an exception to the time limitations period, the statute does not contain an actual innocence exception to the statutorily created time period .[2] Further, no circuit has yet held that actual innocence is an exception to the limitations period. Thus, the Circuit Court did not err in denying a certificate under Slack. Additionally, petitioner's claim does not establish a constitutional violation as it does not meet the Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), actual innocence standard. Thus, petitioner's has failed to establish a basis for the granting of certiorari in this case.

Finally, petitioner has failed to show that the decision of the Eleventh Circuit applying Slack meets any of the criteria for review by certiorari set out in Rule 10, Rules of the Supreme Court. Therefore, review should be denied.

Respondent asserts that the petitioner has not shown a basis for the exercise of this Court's jurisdiction. The state asserts that the question presented is not properly before this Court as this question was not passed upon by the Eleventh Circuit. Additionally, the only viable question is not of constitutional dimension and was decided in conformance to this Court's Slack decision. Having shown no basis to invoke this Court's certiorari jurisdiction, all relief must be denied.

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[2] The statute does contain other exceptions including a newly discovered evidence exception.

## CONCLUSION

Based on the above cited legal authorities and arguments, the respondent respectfully requests this Honorable Court to deny Mr. Chapin's petition for a writ of certiorari.

Respectfully submitted,

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